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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NICK J GARDUNO,

No. C 02-5806 JSW

Petitioner,

v.

**ORDER LIFTING STAY AND  
ORDER TO SHOW CAUSE**

GAIL LEWIS, Warden,

Respondent.

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On October 15, 2004, the Court issued an order staying this matter pending the complete exhaustion of Petitioner Nick J. Garduno (“Petitioner”)’s state remedies. Petitioner represents that he has now exhausted his state remedies and has filed a third amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**BACKGROUND**

Petitioner was convicted by a jury of one count of attempted murder, one count of assault with a firearm, and two counts of inflicting corporal injury on his spouse. Petitioner was sentenced to twenty-five years to life, plus seven years.

**LEGAL CLAIMS**

Petitioner seeks federal habeas corpus relief by raising the following claims: (1) the evidence is insufficient to support the conviction in violation of the Due Process Clause; (2) the trial court erroneously provided the same instructions for attempted murder and attempted manslaughter in violation of the Due Process Clause; (3) the trial court erroneously instructed the jury regarding lesser charges in violation of the Due Process Clause; and (4) ineffective

1 assistance of counsel in violation of the Sixth Amendment. Liberally construed, the claims  
2 appear potentially colorable under 28 U.S.C. § 2254 and merit an answer from Respondents.

3 **CONCLUSION**

4 The Court ORDERS that the stay is HEREBY LIFTED. For the foregoing reasons and  
5 for good cause shown:

- 6 1. Petitioner shall serve by certified mail a copy of this Order and the petition and  
7 all attachments thereto upon Respondents.
- 8 2. Respondents shall file with the Court and serve on Petitioner, within 60 days of  
9 the date of this Order, an answer conforming in all respects to Rule 5 of the  
10 Rules Governing Section 2254 Cases, showing cause why a writ of habeas  
11 corpus should not be issued. Respondents shall file with the answer and serve on  
12 Petitioner a copy of all portions of the administrative record that are relevant to a  
13 determination of the issues presented by the petition.
- 14 3. If Petitioner wishes to respond to the answer, he shall do so by filing a traverse  
15 with the Court and serving it on Respondents within 30 days of his receipt of the  
16 answer.

17 **IT IS SO ORDERED.**

18 Dated: January 26, 2006

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20 JEFFREY S. WHITE  
21 UNITED STATES DISTRICT JUDGE  
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